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No. 82-709

In the Supreme Court of the United States

OCTOBER TERM, 1982

NICODEMO SCARFO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that admission of a list of telephone numbers and certain other evidence at his trial constituted reversible error.

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of possession of a firearm, in violation of 18 U.S.C. App. 1202(a)(1). He was sentenced to two years' imprisonment and a $5000 fine. A divided panel of the court of appeals affirmed (Pet. App. A-1 to A-30).

1. Executing a search warrant, local police discovered a .22 caliber derringer in the top drawer of a dresser in the master bedroom of petitioner's apartment (Pet. App. A-2 to A-3). The gun was inside an eyeglass case that had been cut down to serve as a holster and attached by a rubberband to

another eyeglass case, which contained petitioner's eyeglasses (Pet. App. A-8; II Tr. 138-139).[1] Petitioner's passport, some men's socks, a photocopy of a list of telephone numbers, and eleven miscellaneous pieces of paper were also found in the dresser drawer. When petitioner was arrested, the original of the list of telephone numbers was in his wallet (Pet. App. A-8 to A-9; II Tr. 139-143, 146, 152, 202; GX 7A, 7B, 7B1, 10). No female clothing was in the drawer, and the remainder of the dresser contained only male clothing (Pet. App. A-8 to A-9; II Tr. 165, 178), as did the closet next to the dresser (Pet. App. A-9; III Tr. 72-73). The dresser and the closet in a nearby smaller bedroom contained only female clothing (Pet. App. A-9; III Tr. 43-44). Petitioner's wife was present during the search. When the gun was discovered, she claimed it as her own, but said the eyeglasses belonged to her husband (Pet. App. A-8; II Tr. 156, 150, 172-173).

The search warrant was issued in connection with a state homicide investigation; it authorized the officers to search for a "jogging suit and handgun/or property of the victim" (Pet. App. A-3; A. 8a). Before trial, petitioner moved to suppress the fruits of the search on a number of grounds, including the argument that the seizure of items not specified in the warrant was improper. At the suppression hearing the officer who seized the gun explained that he had seized the miscellaneous papers because they "appeared to be records of some type, possibly loansharking records or bookmaking records," and petitioner was rumored to be involved in that type of activity (Pet. App. A-18; II Tr. 57-58).

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[1] "Tr." refers to the transcript of the trial and the pretrial evidentiary hearing; "A." refers to petitioner's appendix in the court of appeals; "GX" refers to government exhibits.

2. The district court ruled that the seizure of the items not specified in the warrant was justified under the plain view doctrine (Pet. App. A-33; II Tr. 96). On appeal petitioner challenged the admission of the photocopy of the list of telephone numbers and the miscellaneous pieces of paper (Pet. App. A-4 n.4). The court of appeals majority found it unnecessary to consider the Fourth Amendment question because admission of the evidence was harmless beyond a reasonable doubt (Pet. App. A-6 to A-11). Judge Gibbons dissented (*id.* at A-13 to A-30). The court of appeals' application of the well-established harmless error standard to the facts of this case is correct and presents no issue warranting review in this Court.

3. The trial judge correctly instructed the jury (IV Tr. 109):

> You may find that the element of possession as that term is used in these instruction is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession [of the gun] either alone or jointly with others.

See, e.g., *United States* v. *Smith*, 591 F.2d 1105, 1107 (5th Cir. 1979); *United States* v. *Scarborough*, 539 F.2d 331, 334 & n.10 (4th Cir. 1976), aff'd on other grounds, 431 U.S. 563 (1977). Contrary to petitioner's assertion (Pet. 12) and the view of the dissenting judge in the court of appeals (Pet. App. A-16), neither the miscellaneous pieces of paper nor the list of telephone numbers was critical to the government's case against petitioner. The gun was found with petitioner's passport and attached to petitioner's eyeglass case, in the drawer of a dresser in the master bedroom of his apartment. Without more these facts virtually compel the conclusion that petitioner had at least joint dominion over and control of the weapon. The only "evidence" casting any doubt on this obvious conclusion is the out-of-court

statement of petitioner's wife that she owned the gun.[2] She did not testify at trial, but the claim that the gun belonged to her is wholly incredible since the drawer in which the gun was found contained only men's clothing, her husband's passport, and his eyeglasses, and no female clothing was found anywhere in the room.

At most, the miscellaneous pieces of paper and the photocopy of the list of telephone numbers provided additional support for the conclusion that petitioner had access to and used the dresser drawer in the master bedroom of his home. Since, as petitioner concedes (Pet. 7), the search of the dresser drawer was plainly lawful, the police officer could have testified that he saw the telephone list and the pieces of paper in the drawer. Thus, there is no reasonable likelihood that exclusion of the evidence would have affected the verdict. Compare *Harrington* v. *California*, 395 U.S. 250 (1969). Accordingly, the court of appeals correctly held that failure to exclude the evidence, if error, was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).[3]

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[2]At the suppression hearing, however, petitioner's wife denied that the gun belonged to her. II Tr. 14. Instead, she claimed she had found the gun several years earlier in the shirt pocket of her husband's friend. *Id.* at 5-17. She testified that she found the gun while she was doing some laundry for her husband's friend, whom she knew only as "Cookie." She intended to return the gun to him, but he never returned.

[3]It is unnecessary to address the merits of petitioner's Fourth Amendment claim. We note, however, that petitioner's arguments that the discovery was not "inadvertent" and that the incriminating nature of the evidence was not "immediately apparent" appear to be based, in large part, on the erroneous assertion (see Pet. 4, 7-8, 11) that the warrant authorized only the seizure of a gun and a jogging suit. On the contrary, the officers were also authorized to search for and seize any "property of the victim." Thus, as the dissent acknowledged (Pet. App. A-23 to A-24), the "minimal and casual nature of the inspection necessary to ascertain the contents of the papers" did not negate the inadvertence of the discovery. Nor does the fact that the police officer had to

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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read the documents to ascertain their character indicate that their evidentiary value was not "immediately apparent." Further, after disclaiming any objection to admission of the evidence (II Tr. 152-153), petitioner successfully objected to the police officer's attempt to explain why he believed the evidence was incriminating (II Tr. 176-177).

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